IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES H. BOYER and ROSALINDA BOYER, Co-Administrators of the Estate of Jamie H. Boyer and JAMES H. BOYER and ROSALINDA BOYER in their own right,	:	**CIVIL ACTION**
Plaintiffs,	:	
v.	:	
CASE CORPORATION, a Tenneco Co., d/b/a J. I. CASE CO.,	:	**No. 97-4540**
Defendant.	:	

M E M O R A N D U M - O R D E R

AND NOW, this 24th day of April, 1998, upon consideration of the motion to dismiss of defendant Case Corporation ("Case") (Document No. 8), the response brief of plaintiffs, James and Rosalinda Boyer ("the Boyers") (Document No. 9), the supplemental memorandum of law of defendant (Document No. 12), and the response of plaintiff thereto (Document No. 15), and having found and concluded that:

1. On July 11, 1997, the Boyers filed suit in diversity in this Court (Document No. 1) on behalf of their son and themselves for the death of their son, Jamie Boyer, who was killed while using an industrial machine, a Case Uniloader, Model 1835B ("Uniloader"), designed and manufactured by Case. The Boyers sought relief on a number of grounds including breach of a post-sale duty to warn and a duty to recall and retrofit in both strict liability and negligence;

2. This Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332. Pennsylvania law applies;

3. On the morning of February 6, 1996, Jamie was assigned by his employer, the Devault Crushed Stone Company, to clear ice and snow from work areas in his employer's quarry. Jamie was instructed to use his employer's Uniloader to carry

out his work. While clearing the snow, Jamie "inadvertently . . . hit, touched or moved the [Uniloader]'s boom control, possibly with his left leg/hip, causing the boom to rise, striking Jamie's upper chest and, consequently, crushing him into the structure above the operator compartment, better known as the ROPS (rollover protection structure), causing his asphyxiation and death." Compl. para. 14. Case designed, manufactured, assembled and marketed the Uniloader which, the Boyers claim, was sold to Jamie's employer early in 1987 by a local Case dealership;

4. Case seeks dismissal of Counts IV, V ¶ 25(j), and VIII ¶ 35(e) for breach of a post-sale duty to warn of the defective design of the Uniloader and Counts III, V ¶ 25(i), and VIII ¶ 35(d), (e) & (f) for breach of a duty to recall and retrofit the Uniloader;

5. The first and only Pennsylvania Supreme Court case recognizing a defendant manufacturer's limited post-sale duty to warn is Walton v. Avco Corp., 610 A.2d 454 (Pa. 1992), which held that a helicopter manufacturer had a post-sale duty to warn of a defective oil pump because "[h]elicopters are not 'ordinary goods' . . . that could get swept away in the currents of commerce, becoming impossible to track or difficult to locate. Helicopters are not mass-produced; . . . to the contrary, they are sold in a small and distinct market. Additionally, establishments that service helicopters are convenient and logical points of contact." Walton, 610 A.2d at 459. Walton was limited to the particular facts of the case before the court;

6. In support of its motion, Case points to Habecker v. Clark Equip. Co., 797 F. Supp. 381 (M.D. Pa. 1992), aff'd 36 F.3d 278 (3d. Cir 1994), cert. denied, 514 U.S. 1003 (1995), in which the court applied Walton and held that the manufacturer of a forklift that lacked a seat restraint had no post-sale duty to warn users about the risks inherent in operating the forklift without a seat restraint. Habecker found that forklifts are a "common business appliance" and not, like a helicopter, manufactured and sold in "a small and distinct market . . . [with] convenient and logical points of contact" with the consumer. Id. at 395. Case argues that a Uniloader, like a forklift, is a "common business appliance" not subject to the post-sale duty to warn. Habecker had a record developed through a complete trial;

7. In response, the Boyers argue that Walton requires a factual inquiry that the record cannot support and contends that they have evidence that Case maintains records of the purchasers of its products and that Case has, in the past, issued "Safety Bulletins" after the sale of other products. However, the Boyers have not alleged these or similar facts that show that "convenient and logical points of contact exist" and that the market for Uniloaders is "small and distinct." This Court may only consider the pleadings for this motion to dismiss. Therefore,

the complaint as such does not state a cause of action for breach of a post-sale duty to warn under the law of Pennsylvania;

8. Pennsylvania does not recognize a duty to recall and retrofit. See Habecker v. Copperloy, 893 F.2d 49, 54 (3d Cir. 1990) (citing Lynch, 548 A.2d at 1281, for the proposition that "such a duty would be inappropriate under established principles of Pennsylvania law."); see also Girard v. Allis Chalmers Corp., Inc., 787 F. Supp 482, 486 n. 3 (W.D. Pa. 1992).[1] The Boyers argue, nonetheless, for an extension of Walton to include a duty to recall and retrofit. The Boyers attempt to distinguish Lynch on the grounds that the alleged defect in the Uniloader was known to Case at the time of manufacture. In addition, the Boyers argue, the concern Lynch had with the onerous burden placed on manufacturers by a duty to recall and retrofit was mooted by Walton. This Court disagrees. Walton only created a limited and narrow post-sale duty to warn based on the particular facts of the case before the Court. See Walton, 610 A.2d at 459; Habecker, 797 F. Supp. at 395. Based on that narrow holding in Walton, this Court does not predict that the Supreme Court of Pennsylvania would extend Walton to include a duty to recall and retrofit;

it is hereby accordingly **ORDERED** that the motion is **GRANTED.** Accordingly, Counts III, V ¶ 25(i), and VIII ¶ 35(d), (e) & (f) claiming a breach of a duty to recall or retrofit are **DISMISSED WITH PREJUDICE,** and Counts IV, V ¶ 25(j), and VIII ¶ 35(e) claiming a breach of a post-sale duty to warn are **DISMISSED WITHOUT PREJUDICE**. The plaintiffs may amend no later than **May 11, 1998** only Counts IV, V ¶ 25(j), and VIII ¶ 35(e) and those paragraphs of the complaint containing background facts relevant to these Counts, to the extent that the facts and Rule 11 of the Federal Rules of Civil Procedure allow.

LOWELL REED, JR., J.

[1] Many other jurisdictions do not acknowledge a duty to recall and retrofit. See, e.g., Davis v. Globe Mfg Co., 684 P.2d 692 (Wash. 1984); Burke v. Deere & Co., 6 F.3d 497 (8th Cir. 1993 (applying Iowa law to a farm combine), cert. denied, 510 U.S. 1115 (1994); Romero v. International Harvester Co., 979 F.2d 1444 (10th Cir. 1992) (applying Colorado law to a farm tractor); Morrison v. Kubota Tractor Corp., 891 S.W.2d 422 (W.D. Mo. 1994) (applying Missouri law to a tractor).